



June 26, 2018

**By Electronic Submission**

Regional Freedom of Information Officer  
U.S. Environmental Protection Agency, Region 3  
1650 Arch Street (3CG00)  
Philadelphia, PA 19103  
<https://foiaonline.regulations.gov>

**RE: Freedom of Information Act Request Regarding Pleasants Power Station**

Dear Regional FOI Officer:

This is a request for information on behalf of Earthjustice and Sierra Club (collectively, "Public Interest Organizations") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Environmental Protection Agency's ("EPA") FOIA regulations, 40 C.F.R. § 2.100 *et seq.*

The Public Interest Organizations also request a fee waiver for this request under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107.

**I. Records Requested**

The Public Interest Organizations request all records created, stored, or received from January 1, 2013 through the date of EPA's search in response to this FOIA request as follows:

1. Any reports or other documents identifying periods from January 1, 2013 to present when Pleasants Power Station did not operate its selective catalytic reduction pollution controls (Title V Operating Permit Appendix D).
2. Any records regarding selective catalytic reduction maintenance at the Pleasants Power Station from January 1, 2013 to present.
3. Any records regarding malfunction or operational shutdown of air pollution control equipment (see Section 4.4.6 of the Title V Permit) at the Pleasants Power Station from January 1, 2013 to present.

4. Any reports of excess emissions under Section 4.5.1 of the Title V Permit from January 1, 2013 to present.
5. Any applications or supplemental submissions since October 17, 2013 for renewal of the Title V Permit.
6. Any records regarding enforcement of air pollution requirements at the Pleasants Power Station, including but not limited to inspection reports, correspondence, notices of violation, and complaints.
7. Any records regarding emissions from the Pleasants Power Station and ambient air quality from January 1, 2013 to present.
8. All records regarding air pollution controls at the Pleasants Power Station from January 1, 2013 to present.

As used in this request, "Title V Permit" is the Permit to Operate the Pleasants-Willow Island Power Stations, R30-07300005-2013, issued October 17, 2013 (Exhibit A to this letter).

For purposes of this request, the term "records" means information of any kind, including, but not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. As used herein, "and" and "or" shall be construed either conjunctively or disjunctively as required by the context to bring within the scope of these requests any information which might be deemed outside their scope by any other construction.

FOIA requires that you respond within 20 working days of your receipt of this request, *see* 5 U.S.C. § 552(a)(6)(A)(i), and that that response must "at least indicate within the relevant time period the scope of the documents [you] will produce and the exemptions [, if any, you] will claim with respect to any withheld documents." *Citizens for Responsibility and Ethics in Washington v. F.E.C.*, 711 F.3d 180, 182-83 (D.C. Cir. 2013).

We ask that you disclose this information as it becomes available to you without waiting until all of the communications and records have been assembled for the time period requested. The Public Interest Organizations request electronic copies of the records whenever possible.

## **II. Claims of Exemption from Disclosure**

If EPA regards any documents as exempt from required disclosure under the Freedom of Information Act, please identify each allegedly exempt record in writing, provide a brief description of that record, and explain the agency's justification for withholding it. This

explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and other related cases. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempted from disclosure.

### III. Fee Waiver

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107, the Public Interest Organizations request that EPA waive all fees associated with responding to this request because the organizations seek this information in the public interest and will not benefit commercially from this request. If EPA does not waive the fees entirely, the Public Interest Organizations request that it reduce them to the extent possible.

FOIA provides that fees shall be reduced “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”<sup>1</sup> EPA’s FOIA regulations contain an identical requirement.<sup>2</sup> The U.S. Department of Justice (DOJ) has identified six factors to assess whether a requester is entitled to a waiver of fees under FOIA, and the D.C. Circuit and other Courts of Appeals—as well as EPA’s own regulations—reference and apply these factors.<sup>3</sup> These factors are:

- A. Disclosure of the Information ‘is in the Public Interest Because it is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government.’
  - (1) **The subject of the request:** Whether the subject of the requested records concerns ‘the operations or activities of the government’;
  - (2) **The informative value of the information to be disclosed:** Whether the disclosure is ‘likely to contribute’ to an understanding of government operations or activities;
  - (3) **The contribution to an understanding of the subject by the general public likely to result from disclosure:** Whether disclosure of the requested information will contribute to ‘public understanding’; and

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<sup>1</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>2</sup> 40 C.F.R. § 2.107.

<sup>3</sup> See, e.g., Stephen J. Markman, U.S. Dep’t of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance (1987), available at <https://www.justice.gov/oip/blog/foia-update-new-fee-waiver-policy-guidance>; *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (stating that “for a request to be in the ‘public interest,’ four criteria must be satisfied,” and citing agency’s multi-factor fee waiver regulation); 40 C.F.R. § 2.107.

- (4) **The significance of the contribution to public understanding:** Whether the disclosure is likely to contribute ‘significantly’ to public understanding of government operations or activities.
- B. Disclosure of the Information ‘is Not Primarily in the Commercial Interest of the Requester.’
  - (1) **The existence and magnitude of a commercial interest:** Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so
  - (2) **The primary interest in disclosure:** Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ‘primarily in the commercial interest of the requester.’<sup>4</sup>

The Public Interest Organizations’ request complies with each of the factors agencies weigh in a fee waiver determination, as demonstrated below. If this information is not sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

#### **A. Public Interest Factor**

The disclosure of this information is in the “public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”<sup>5</sup> The Public Interest Organizations’ request complies with each of the criteria DOJ has identified for the public interest factor.

##### **i. The request concerns the operations or activities of the government.**

The Public Interest Organizations seek information regarding air pollution control equipment at the Pleasants Power Station. Air pollution from this power station is regulated by EPA to advance the objectives of the Clean Air Act, which EPA administers in cooperation with state and other agencies. Therefore, these EPA records concern “operations or activities of the government.”<sup>6</sup>

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<sup>4</sup> Markman, *supra* note 3.

<sup>5</sup> See 40 C.F.R. § 2.107(l)(1).

<sup>6</sup> See *id.* § 2.107(l)(2)(i).

**ii. The disclosure is “likely to contribute” to an understanding of government operations and activities.**

The records the Public Interest Organizations have requested bear upon EPA’s regulation of air pollution at the Pleasants Power Station, including enforcement of air pollution requirements. Thus, disclosure is “likely to contribute” to public understanding of government operations and activities.<sup>7</sup>

**iii. The information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.**

This information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.<sup>8</sup> Air pollution in West Virginia, its wider effects in the Eastern United States, and EPA’s response thereto, are topics of regular interest to a broad audience of Americans.

The Public Interest Organizations are able to ensure that the information requested will be disseminated to the general public.

Earthjustice is a non-profit public interest law organization dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all people to a healthy environment.<sup>9</sup> Earthjustice has made safeguarding the nation’s air one of its top priorities. Earthjustice has the “ability and intention” to convey the information regarding air pollution from the Pleasants Power Station to the public.<sup>10</sup> Earthjustice can publicize information received from this request in its monthly electronic newsletter, which serves over 200,000 subscribers, and it can utilize its online action alert system to urge members of the public to contact policymakers and ask them to take action based on information received from this request; typically, 15,000 to 20,000 individuals respond to such alerts. Earthjustice’s communications staff can disseminate newsworthy information obtained from this request to the media.

The Sierra Club is the nation’s oldest and largest grassroots environmental organization, with more than 3 million members and supporters, including online activists and newsletter subscribers. Its website is highly trafficked and Sierra Club media and communications reach hundreds of thousands of people through an extensive digital communications network and online information system, print magazine, radio show, web videos, and news reports.

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<sup>7</sup> See 40 C.F.R. § 2.107(l)(2)(ii).

<sup>8</sup> See *id.* § 2.107(l)(2)(iii).

<sup>9</sup> See <http://earthjustice.org/about>.

<sup>10</sup> See, e.g., Markman, *supra* note 3.

The Public Interest Organizations each have the ability to digest and quickly disseminate information gleaned from FOIA requests to the general public, and thus are well positioned to analyze and publicize the requested information.

**iv. The information will contribute “significantly” to public understanding of government operations or activities.**

The information the Public Interest Organizations seek will contribute “significantly” to public understanding of EPA’s investigation and response to air pollution at the Pleasants Power Station. The Public Interest Organizations will make any newsworthy information or documents received in response to this request publicly available and will use them as the bases for public advocacy and investigation. Releasing this information will, thus, significantly enhance public understanding of any EPA activities concerning air pollution from the Pleasants Power Station.

**B. Commercial Interest Factor**

Public Interest Organizations are non-profit organizations with no commercial, trade, or profit interests in the requested information. Public Interest Organizations seek to use this information solely for their investigation of air pollution issues at the Pleasants Power Station and to inform the public and to support advocacy efforts around protecting human health and the environment. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest.

For all of the foregoing reasons, a fee waiver is warranted here under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107. If EPA does not believe that the above information is sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

Thank you for your assistance. If you have any questions, please contact me at (215) 717-4521 or [cmcphe dran@earthjustice.org](mailto:cmcphe dran@earthjustice.org)

Sincerely,

A handwritten signature in black ink, appearing to read 'Charles McPhedran', written over a horizontal line.

Charles McPhedran  
Earthjustice

*Submitted on behalf of Earthjustice and Sierra Club*

Enclosure (Exhibit A)